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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1712.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

LUCY McBRIDE, CLAUDE L. McBRIDE, SUSAN A. McBRIDE, AND ELIZABETH H. McBRIDE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED APRIL 13, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 28, 1891.

1 UNITED STATES OF AMERICA,
Western District of Arkansas.

In the Circuit Court of the United States for the Western District of Arkansas. November Term, A. D. 1890.

LUCY MCBRIDE and CLAUDE MCBRIDE, SUSAN A. McBride, and Elizabeth H. McBride, Minors, Who Sue by Their Next Friend, the said Lucy McBride, Pl's,
vs.
THE SAINT LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Defendants.
} Complaint at Law.

The plaintiffs herein, Lucy McBride and Claude L. McBride, Susan A. McBride, and Elizabeth McBride, minor children, who sue by their next friend, the said Lucy McBride, all of whom (the said plaintiffs) are citizens and residents of the State of Arkansas and of the western district of Arkansas aforesaid, complaining of said defendant, The Saint Louis and San Francisco Railway Company, a corporation duly organized by and existing under the laws of the State of Missouri and a citizen of the said State of Missouri, but doing business in the said State of Arkansas, in the western district of Arkansas aforesaid, by permission of the laws of the said State of Arkansas, and in the Choctaw Nation, in the Indian Territory, in said western district of Arkansas aforesaid, by authority of an act of the Congress of the United States approved August 2nd, 1882, in owning, maintaining, and operating a line of railway extending from Saint Louis, in the State of Missouri, to Paris, in
2 the State of Texas, and passing through the counties of Benton, Washington, Crawford, and Sebastian, in said State of Arkansas and in said western district of Arkansas aforesaid, and through the said Choctaw Nation, in the Indian Territory, and in said western district of Arkansas, and having duly authorized agents engaged in carrying on said business in said State and said western district of Arkansas, upon whom process may be served in accordance with the laws of the State of Arkansas and with the act of Congress extending said laws over the said Indian Territory; and said plaintiff further states that the said Lucy McBride is the widow of James A. McBride, deceased, and that Claude L., Susan A., and Elizabeth H. McBride are the only surviving children of the said James A. McBride, deceased, and that the plaintif-s are the next of kin and heirs-at-law of the said James A. McBride, deceased, and that there are no personal representatives of the said James A. McBride, deceased; and for their cause of action said plaintiffs allege that on the 20th day of July, 1890, and for some weeks prior thereto the said James A. McBride was in the employ of the said defendant as a brakesman on a freight train on the said railway, and in the discharge of his duty as such brakesman as aforesaid, when, on the said 20th day of July, 1890, near Cavanal station, on said railway, in

the *in the* Choctaw Nation, in said Indian Territory and in said western district of Arkansas, while said train was in rapid motion, a journal, axle, and wheel of said car, on which said James A. McBride was riding in discharge of his duty as aforesaid, broke and caused the said James A. McBride to be thrown with great violence from the top of said car to the ground, and thereby inflicted upon him, the said James A. McBride, then and there divers severe
3 wounds and bruises, from which afterwards, to wit, on the 22nd day of July, 1890, the said James A. McBride died.

Said plaintiff alleges that it was the duty of said defendant to use diligence, care, and skill to provide a safe place for said brakesman to work, and to furnish said car on which said James A. McBride was working with safe and suitable appliances and machinery, and safe axles, journals, and wheels, and to use due care, skill, and diligence to inspect, repair, and maintain the same in safe and proper condition, so as not to expose the life and limbs of its said employee to danger; but the plaintiffs allege that, in violation of its said duty, the said defendant wholly neglected and failed to use said care, skill, and diligence to provide a safe place for its said servant to work, and to furnish, inspect, repair, and maintain in safe and proper condition the said journal, axle, and wheel of the car on which the said James A. McBride was working as aforesaid, and by such failure and negligence caused the death of the said James A. McBride.

The plaintiffs allege that by the said negligent killing of their husband and father by the said defendant they have been deprived of his society, counsel, comfort, protection, labor, and wages, and are left destitute; that they were dependent upon his labor for a support, and that by the negligent killing of said James A. McBride as aforesaid these plaintiffs are damaged in the sum of twenty thousand dollars. Wherefore they bring suit and pray judgment against said defendant in the sum of $20,000.00 and all their costs in this cause laid out and expended.

LUCY McBRIDE,
CLAUDE L. McBRIDE,
SUSAN A. McBRIDE, &
ELIZABETH H. McBRIDE,
By their next friend, LUCY McBRIDE, *Plaintiffs*,
By GRACE & OSBORNE,
Their Attorneys.

4 I, Lucy McBride, one of the above-named plaintiffs, on oath state that the above facts are true, as I verily believe.

(Signed) MRS. LUCY McBRIDE.

Sworn to and subscribed before me this 19 day of Sept., 1890.

(Signed) J. F. CONLEY, *J. P.*

5 UNITED STATES OF AMERICA,
Western District of Arkansas.

In the Circuit Court of the United States for the Western District of Arkansas.

LUCY MCBRIDE *et al.*, Plaintiff-,
vs.
SAINT LOUIS & SAN FRANCISCO RAILWAY COMPANY, Defendant.
} Bill of Exceptions.

Be it remembered that in the above-entitled cause the following proceedings were had at and during the regular November term, A. D. 1890, of the aforesaid court, to wit:

On the 4th day of November, A. D. 1890, defendant filed its demurrer to plaintiffs' complaint, for want of jurisdiction, in the United States circuit court for the western district of Arkansas aforesaid, over the person of the defendant, the subject-matter of the action, and because the complaint does not state facts sufficient to constitute a cause of action.

Which demurrer aforesaid is in words and figures as follow*ing*, to wit:

(Caption omitted.)

Comes the defendant herein and demurrs to plaintiffs' complaint—

1st. Because the court has no jurisdiction of the person of the defendant.

6 2nd. Because the court has no jurisdiction of the subject-matter of the action.

3rd. Because the complaint does not state facts sufficient to constitute a cause of action.

(Signed) CLAYTON, BRIZZOLARA & FORRESTER,
Its Attorneys.

That afterwards, to wit, on the — day of ——, A. D. 1890, at and during the regular November term, 1890, of said court, the aforesaid demurrer heretofore filed in this case was argued and submitted to the court, and being by the court considered, was by it overruled; to which ruling and order of the court in overruling the demurrer aforesaid the defendant then and there, at the time, excepted.

That afterwards, at the trial of this cause in said court, on the — *ady* of January, A. D. 1891, at the November term, 1890, thereof, it was admitted that the said plaintiff's husband, John J. McBride, deceased, was a white man and not an Indian, neither by birth, blood, marriage, or adoption; that at the time of the injuries complained of and at the time he was injured, as set forth and alleged in the complaint herein, *that* the deceased was a citizen of the State of Arkansas, and resided in the city of Fort Smith, Sebastian county, Arkansas, in said western district of Arkansas; that at the time he was injured he was not an inhabitant nor resident of the Choctaw

Nation, Indian Territory, but was a brakeman on defendant's train, and was injured at Cavanal, in said Choctaw Nation.

Whereupon, after all the evidence *ahd* been introduced by
7 both parties to maintain their respective issues and the court came to charge or instruct the jury, the defendant, among other instructions, asked in its behalf the following instruction:

Fifteenth. If the jury believes from the evidence that the injury to the deceased occurred in the Choctaw Nation, in the Indian Territory, and that the deceased was a citizen and inhabitant of the State of Arkansas, and that he was not an Indian, and was not an inhabitant of the Choctaw Nation, then you are instructed that in such case this court has no jurisdiction to try this case, and you will find for the defendant.

Which said instruction the court then and therr refused to give to the jury; to which ruling of the court the defendant then and there, at the time, excepted.

This was the only instruction asked for or presented by either of the parties to this cause in regard to the question of the jurisdiction of this court to try the aforesaid cause.

Whereupon the jury returned into court the following verdict:

"We, the jury, find for the plaintiffs the sum of four thousand dollars ($4,000.00).

(Signed) JOHN D. WALDRON, *Foreman.*"

Whereupon the said defendant, on the 30th day of January, 1891, filed its motion for new trial; which motion is in words and figures following, to wit:

8 (Caption omitted.)

Comes the defendant and moves the court to set aside the verdict heretofore rendered in this case and grant a new trial, and for cause shows:

1st. That the verdict is against the law.

2nd. That the verdict is against the evidence.

3rd. That the court erred in giving the instructions from —— to —— on its own motion over the objection of the defendant.

5th. That the court erred in refusing to give the first and fifth instructions asked for by the defendant.

6th. That the court erred in modifying the third, eighth, and eleventh instructions asked for by the defendant over the objection of the defendant.

(Signed) CLAYTON BRIZZOLARA & FORRESTER,
Attorneys for Defendant.

And the said defendant, on the 16th day of February, at the February term, 1891, of said court, filed its amended motion for new trial; which amended motion for new trial is in words and figures following, to wit:

(Caption omitted.)

Comes the defendant and moves the court to set aside the verdict heretofore rendered in this case and to grant a new trial herein, and for cause shows:

First. Because the verdict is contrary to law.

Second. Because the verdict is contrary to the evidence.

Third. Because the verdict is not supported by the evidence.

Fourth. Because the verdict is contrary to both the law and the evidence.

9 Fifth. Because of the error of the court in giving instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, & 12, asked for by the plaintiff, over the objections of the defendant.

Sixth. Because the court erred in refusing to give instructions numbered 1, 5, & 15, asked for by the defendant.

Seventh. Because the court erred in modifying instructions numbered 3 & 11, asked for by the defendant, and in giving them as so modified to the jury over the objection of the defendant.

Ninth. Because the court erred in admitting improper evidence over the objections of the defendant, to which the defendant at the time excepted, and which evidence will be fully set forth in the bill of exceptions.

Tenth. Because the court erred in refusing to admit evidence offered by the defendant, to which the defendant at the time excepted.

Eleventh. Because the damages are excessive, appearing to have been given under the influence of passion or prejudice.

Twelfth. Because the court had no jurisdiction of the person of the defendant or of the subject-matter of th- action.

(Signed) CLAYTON, BRIZZOLARA & FORRESTER,
Attorneys for Defendants.

10 Which said respective motions afterwards, to wit, on the 16th day of February, 1891, came on for hearing.

Whereupon the court overruled the same; to which action of the court in overruling said respective motions the said defendant then and there, at the time, excepted and prayed the court that its exceptions might be allowed, which was done, and this its bill of exceptions was signed and sealed on the 24th day of February, A. D. 1891, and made a part of the records in this cause.

(Signed) I. C. PARKER,
U. S. Judge, Holding Circuit Court.

11 UNITED STATES OF AMERICA, }
Western District of Arkansas. }

To the honorable justices of the Supreme Court of the United States:

And now comes the Saint Louis & San Francisco Railway Company, by Clayton, Brizzolara & Forrester, its attorneys, and complains that in the records and proceedings and also in the rendition

of judgment in a suit between Lucy McBride *et al.*, plaintiff-, and The Saint Louis and San Francisco Railway Company, defendant, tried in the circuit court of the United States for the western district of Arkansas, at the November term thereof, eighteen hundred and ninety, and in which judgment was rendered against it on the 26th day of January, A. D. eighteen hundred and ninety-one, manifest error hath intervened, to the great damage of the said Saint Louis and San Francisco Railway Company.

Wherefore it prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

(Signed) ST. LOUIS & SAN FRANCISCO R'Y CO.,
By CLAYTON, BRIZZOLARA &
FORRESTER, *Its Attorneys.*

12 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Lucy McBride *et al.*, as plaintiffs, and The St. Louis & San Francisco R'y Co., defendant, a manifest error hath happened, to the great damage of the said St. Louis & San Francisco R'y Co., as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 16 day of March, in the year of our
13 Lord one thousand eight hundred and ninety-one.

STEPHEN WHEELER,
Clerk of the Circuit Court,
By J. M. DODGE, *Deputy Clerk.*

Allowed by—
I. C. PARKER,
U. S. Dist. Judge, Holding Circuit Court.

14 UNITED STATES OF AMERICA, *ss:*

To Lucy A. McBride, Claude L. McBride, Susan A. McBride, and Elizabeth H. McBride, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washingtcn on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the eighth circuit and western district of Arkansas, wherein The Saint Louis and San Francisco Railway Company is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. C. Parker, judge of the district court of the United States for the western district of Arkansas, this 16th day of March, in the year of our Lord one thousand eight hundred and ninety-one, and the year of our Independence one hundred and fifteen.

I. C. PARKER,
U. S. Dist. Judge, Holding Circuit Court.

15 We hereby acknowledge service of the within citation this 17th day of March, A. D. 1891.

GRACE & OSBORNE,
Counsel for Plaintiffs in this Cause in the Circuit Court of the U. S. for the Western Dist. of Arks.

16 UNITED STATES OF AMERICA, }
Western District of Arkansas. }

I, Stephen Wheeler, clerk of circuit court of the United States in and for the western district of Arkansas, hereby certify that the foregoing is a true and correct transcript of the record in the case of Lucy McBride *et al.* against The Saint Louis and San Francisco Railway Company.

The Seal of the Circuit Court, U. S. A., Western District of Ark.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this 17th day of March, A. D. 1891.

STEPHEN WHEELER,
U. S. Circuit Clerk, Western Dist. of Ark.,
By —— ——, *Deputy Clerk.*

17 In the Circuit Court of the United States for the Western District of Arkansas. November Term, 1890.

TUESDAY MORNING, 8½ O'CLOCK, *January 27th*, 1891.

Court met pursuant to adjournment.

Present: The Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

LUCY MCBRIDE and CLAUDE L. McBride, Susan A. McBride, and Elizabeth H. McBride, Minors, Who Sue by Their Next Friend, the said Lucy McBride,
vs.
THE ST. LOUIS AND SAN FRANCISCO R'Y CO.
} Complaint at Law. No. 9.

On this day come the said plaintiffs in their own proper person and by their attorneys, Mess. Grace & Osborn, and comes the defendant, by its attorneys, Mess. Clayton, Brizzolara, and Forrester, and now come the jury heretofore empaneled for the trial of this cause, to wit: Thomas Ulmer, John Harrington, Henry Kuper, Jr., John D. Waldron, B. A. Uptmore, John G. Ellig, J. E. Dunn, E. E. Goddard, John Ayers, Isaiah Bruce, Thomas Vernon, H. T. Townsley, who retired to consider of their verdict, and after some time returned into court the following verdict, to wit:

"We, the jury, find for the plaintiffs the sum of four thousand dollars ($4,000.00).
(Signed) JOHN D. WALDRON, *Foreman.*"

It is therefore considered by the court that the said plaintiffs, Lucy McBride and others, do have and recover of and from the said defendant, The Saint Louis and San Francisco Railway Company, the sum of four thousand dollars, with interest from this date, at the rate of six per cent. per annum, until paid, with all of their costs in and about this suit laid out and expended, for which execution may issue.

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, hereby certify that the foregoing is a true and correct transcript of the verdict and judgment in the above-entitled case as the same appears of record.

The Seal of the Circuit Court, U. S. A., Western District of Ark.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Forth Smith, in said district, this 28th day of March, A. D. 1891.

STEPHEN WHEELER,
U. S. Circuit Clerk, Western Dist. Ark.

Endorsed on cover: W. Arkansas C. C. U. S. No. 1712. The St. Louis & San Francisco Railway Company, plaintiff in error, *vs.* Lucy McBride, Claude L. McBride, Susan A. McBride, and Elizabeth H. McBride. Filed April 13, 1891.

Office Supreme Court U. S.
FILED.
MAY 9 1891
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

LUCY McBRIDE ET AL.

No. 1712

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Brief for Plaintiff in Error in Opposition to Motion to Dismiss or Affirm.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Plaintiff in Error.

GEO. R. PECK.
E. D. KENNA.
of Counsel.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

LUCY McBRIDE ET AL.

No. 1712.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

STATEMENT.

This is an action for damages brought in the Court aforesaid by Lucy McBride, as widow, and for herself and the three minor children of James A. McBride, deceased. The complaint alleges that the plaintiffs are citizens and residents of the State of Arkansas and that the plaintiff in error is a Missouri corporation and citizen thereof, doing business in the State of Arkansas, by permission of the laws thereof, and in the Choctaw Nation, Indian Territory,

by authority of an act of Congress approved August 2, 1882 (22 Stats. 181). That while in the employ of the plaintiff in error as a brakeman the said James A. McBride was thrown from a freight train near Cavanal station, in the Choctaw Nation, Indian Territory, and received injuries from which he died.

To such complaint demurrer was filed upon the following grounds:

"1st. Because the Court has no jurisdiction of the person of the defendant.

"2d. Because the Court has no jurisdiction of the subject-matter of the action.

"3d. Because the complaint does not state facts sufficient to constitute a cause of action."

Rec. 3.

Such demurrer was overruled and exception taken. On the subsequent trial verdict was rendered for the plaintiff in the sum of $4,000.

At the trial the Court was asked to charge the jury as follows:

"Fifteenth. If the jury believes from the evidence that the injury to the deceased occurred in the Choctaw Nation in the Indian Territory, and that the deceased was a citizen and inhabitant of the State of Arkansas, and that he was not an Indian, and was not an inhabitant of the Choctaw Nation, then you are instructed in such case this Court has no jurisdiction to try this case, and you will find for the defendant."

The charge requested was refused by the Court, and exception taken. (Rec. 4.)

Motion for new trial was made *inter alia*.

"Twelfth. Because the Court had no jurisdiction of the

" person of the defendant, or of the subject-matter of the " action."

This motion was overruled, exception taken (Rec. 5), and final judgment entered for plaintiffs in accordance with the verdict (Rec. 8); wherefrom writ of error was prayed and allowed to this Court.

ASSIGNMENT OF ERRORS.

The Circuit Court erred in overruling the demurrer, because it had neither jurisdiction of the person of the defendant nor the subject-matter of the action.

ARGUMENT.

The case is brought before this Court by authority of the Act approved February 25, 1889 (25 Stats. 693). The judgment does not exceed the sum of $5,000, and hence the sole question reviewable here is, as expressed by the Act, " the jurisdiction of the Court " below.

At common law, no action for a tort survived the death, either of him who inflicted, or of him who received it.

" No action," said Lord Mansfield, " where in form the " declaration must be *quare vi et armis et contra pacem*, or " where the plea must be that the testator was not guilty, " could lie against the executor; upon the face of the " record the cause of action arises *ex delicto*, and all pri- " vate criminal injuries or wrongs, as well as public crimes, " are buried with the offender."

Cowper, 375.

So an action would not lie for the personal representative.

"Executors and administrators are the representatives "of the temporal property; that is, the debts and goods "of the deceased, but not of their wrongs, except when "those wrongs operate to the temporal injury of their "personal estate."

Chamberlain's Administrator v. *Williamson*, 2 *Maule & S., per Lord Ellenborough.*

Hence the remedy for the injury here in question is one purely of statutory creation.

It is nowhere contended that any law of the Choctaw Nation is in existence which gives this statutory remedy for injuries of this nature suffered therein. The sole contention is that Congress by the Act approved May 2, 1890, (Laws of 1st Session, 51st Congress, p. 81), to provide a temporary government for the Territory of Oklahoma, and to enlarge the jurisdiction of the United States Court in the Indian Territory, etc., enacted in section 31 (p. 94) "that certain general laws of the State of Arkansas in "force at the close of the session of the General Assembly "of that State of 1883, as published in 1884, in the vol-"ume known as Mansfield's Digest of the Statutes of Ar-"kansas, which are not locally inapplicable or in conflict "with this act or with any law of Congress relating to "the subjects specially mentioned in this section, are "hereby extended over and put in force in the Indian "Territory until Congress shall otherwise provide," etc.

The section recited incorporates a large number of chapters from Mansfield's Digest, including that relating "to Pleadings and Practice, chapter 119."

On reference to this chapter of Mansfield's Digest and under the sub-head "*What Causes of Action Survive*" will be found sections 5225 and 5226, which provide that in case of the death of a person by the wrongful act, neglect or default of another, which in case death had not

ensued would have given the party injured a right of action, such action may be brought in the name of the personal representative of such party, or if there be no such representative, then by the heirs-at-law, etc.

Upon the assumption that these provisions of Chapter 119 of Mansfield's Digest became operative in the Choctaw Nation, Indian Territory, by their adoption as the law applicable thereto in the Act of Congress of May 2, 1890, *supra*, the case has proceeded to verdict and judgment below, and demurrer of the plaintiff in error to the jurisdiction of the Court has been overruled.

I.

The Circuit Court had no Jurisdiction over the Plaintiff in Error.

Assuming for the present that the Act of Congress, in extending over the Indian Territory Chapter 119 of Mansfield's Digest relating to pleadings and practice, did so in such form and to such extent as to give the right of action provided for in sections 5225 and 5226 thereof, where the cause of action arose in the Indian Territory, two conclusions are of certain application to this case:

First. That these provisions contained in the Arkansas law thereby became *laws of the United States* governing the Indian Territory. The law of Arkansas as such can have no extra-territorial operation. When in the language of the Act of Congress same were "extended over and put "in force in the *Indian Territory* until Congress shall "otherwise provide," they became *pro hac vice* Federal laws existing over that Territory by force of Federal enactment alone.

This proposition is self evident. It stands upon the plain ground of original reasoning.

SECOND. It is equally plain that the suit at bar is founded solely upon a statute made, by the Act of May 2, 1890, a law of the United States.

Now the Act approved March 3, 1887, as corrected by the Act of August 13, 1888 (25 Stats. 433), amending the removal Act of March 3, 1875, distinctly provides that where the action arises (*inter alia*) under the "laws of "the United States," then the Circuit Courts shall have jurisdiction thereover. But in such cases Sec. 3 provides that, "No civil suit shall be brought before either of said "Courts against any person, by any original process or "proceeding in any other district than that whereof he is "an inhabitant."

In the case at bar the declaration recites in terms that the plaintiffs are citizens of Arkansas, and the defendant "A corporation duly organized by and existing under the "laws of the State of Missouri, and a citizen of the said "State of Missouri, but doing business in the said State "of Arkansas," etc. Hence it is assumed that the diverse citizenship of the parties gives the Circuit Court complete jurisdiction under that provision of the Act of 1888 immediately following that just quoted, and which reads thus: "But where the jurisdiction is founded only on the "fact that the action is between citizens of different States "suit shall be brought only in the district of the residence "of either the plaintiff or the defendant."

But the error of this assumption is plainly manifest. In *McCormick Harvesting Mc. Co.* v. *Walthers* (134 *U. S.*, *p.* 41), this Court, in considering Section 1 of the Act of March 3, 1887, *supra*, as corrected by the Act of August 13, 1888, *supra*, expressly holds:

"Where the jurisdiction is founded upon any of the "causes mentioned in this section, except the citizenship "of the parties, it must be brought in the district of which "the defendant is an inhabitant; but where the jurisdic- "tion is founded solely upon the fact that the parties are "citizens of different States, suit may be brought in the "district in which either the plaintiff or the defendant re- "sides. 'The concluding lines,' said Mr. Justice Field in "Wilson *v.* Western Union Telegraph Company (34 Fed. "Rep. 65), 'are to be read as a proviso to the general pro- "'vision that no civil suit shall be brought except in the "'district whereof the defendant is an inhabitant.' This "conclusion was reached and announced by many of the "Circuit Courts, and there can be doubt of its correctness. "(Fales *v.* Chicago, Milwaukee, &c., Railway, 32 Fed. Rep. "673; St. Louis, &c. Railroad *v.* Terre Haute &c. Rail- "road, 33 Fed. Rep. 385; Loomis *v.* N. Y. and Cleveland "Gas Co., 33 Fed. Rep. 353; Gavin *v.* Vance, 33 Fed. "Rep. 84; Swayne *v.* Boylston Insurance Co., 35 Fed. "Rep. 1)."

In the case quoted above, the action was for damages for an alleged false and malicious attachment, and hence jurisdiction was founded solely upon the citizenship of the parties. But this Court therein distinctly rules that where the action is founded upon a law of the United States, as is the case at bar, the suit must be brought in the district whereof the defendant is an inhabitant.

Now, the complaint in the present case distinctly avers that the defendant company is a corporation organized and existing under the laws of Missouri and a citizen of Missouri. This Court has many times ruled that a corporation is a citizen solely of the State under whose laws it was created and exists.

In *Insurance Co.* v. *Francis*, 11 *Wall.* 210, it is said:

"A corporation can have no legal existence outside the "sovereignty by which it was created. Its place of resi-

" dence is there, and can be nowhere else. Unlike a nat-
" ural person, it cannot change its domicile at will, and,
" although it may be permitted to transact business where
" its charter does not operate, it cannot, on that account,
" acquire a residence there."

In *ex parte Schollenberger* (96 *U. S.* 377) it is declared that—

"A corporation cannot change its residence or its citizen-
" ship. It can have its legal home only at the place where
" it is located by or under the authority of its charter."

In *Railroad Company* v. *Koontz* (104 U. S. 5) it is again affirmed that—

" By doing business away from their legal residence they
" do not change their citizenship, but simply extend the
" field of their operations. They reside at home, but do
" business abroad."

In *Pennsylvania R.R. Co.* v. *St. Louis, A. & T. H. R.R. Co.* (118 *U. S.* 290) it is said :

" It does not seem to admit of question that a corpora-
" tion of one State owning property and doing business
" in another State by permission of the latter does not
" thereby become a citizen of this State also."

In *Goodlett* v. *Louisville & N. R.R. Co.* (122 *U. S.* 391) it appeared that a corporation originally created under the laws of the State of Kentucky had been, by an act of the Legislature of Tennessee, authorized to construct and operate an extension of its line in the State of Tennessee ; and the Supreme Court, after an exhaustive examination of the authorities, held that the Company must still be deemed to be a Kentucky corporation, and as such to be entitled to remove a suit brought against it in a State

Court of Tennessee. The ground upon which it was, after some conflict in the earlier cases, finally decided that corporations could sue or be sued in the courts of the United States was, that it would be conclusively presumed that a suit by or against a corporation is a suit by or against citizens of the State which created it; it being assumed that the corporation or stockholders are citizens of that State. It is now settled that this is a legal presumption which cannot be gainsaid. (*Railroad Co.* v. *Letson*, 2 *How.* 497; *Railroad Co.* v. *Harris*, 12 *Wall.* 65; *Railroad Co.* v. *Whitton*, 13 *Wall.* 270; *Muller* v. *Dows*, 94 *U. S.* 444.)

In the latter case it is said:

"A corporation itself can be a citizen of no State, in "the sense in which the word is used in the Constitution "of the United States. A suit may be brought in the "Federal courts by or against a corporation, but in such "case it is regarded as a suit brought by or against the "stockholders of the corporation; and for the purpose of "jurisdiction it is conclusively presumed that all the "stockholders are citizens of the State which by its laws "created the corporation."

In *Myers et al.* v. *Murray, Nelson & Co.* (43 *Fed. Rep. p.* 695), in the Circuit Court for the Southern District of Iowa, this question was discussed at length by Judge Shiras, whose conclusions, after citation of foregoing authorities, are expressed in the syllabus of his decision thus:

"A corporation, though carrying on business in several "States, can have a residence only in the State in which "it was created; so that the averment that a corporation "was created under the laws of a certain State precludes "the idea that it may have become a resident of another "State, and is sufficient for a petition for removal of a "cause from a State to a Federal court."

To the same effect is the decision rendered by the same Court in *Fales* v. *R.R. Co.* (32 *Fed. Rep.* 673).

In *Booth* v. *Manufacturing Co.* (40 *Fed. Rep.* 1), Mr. Justice Brewer, after citation of several of the decisions of this Court above quoted, holds:

"In the light of those declarations, I hold that a cor-
" poration created under the laws of another State is a
" citizen of and resident within that State. It can acquire
" no residence here."

In *National Typographic Co.* v. *New York Typographic Co.* (44 *Fed. Rep.* 711), Judge Lacombe affirms the same conclusion upon the decisions of this Court cited *supra*.

It is true that in *Hirschel* v. *Threshing Machine Co.* (42 *Fed. Rep.* 803) Mr. Justice Miller ruled *contra*. The learned Justice's decision simply states with great brevity his conclusion, and submits no reasoning nor citation of authorities in its support.

The language used by this Court in the cases above cited would seem to be conclusive upon this question.

Bouvier says (*title Inhabitant*):

"One who has his domicile in a place is an *inhabitant* of
" that place; one who has an actual fixed residence in a
" place."

Abbot's Law Dictionary (*title Inhabitant*) defines the word as—

"An indweller; one who has his abode, domicile, or resi-
" dence within a place. Inhabitancy; the condition of
" living within a place."

And gives numerous authorities illustrating this definition.

A person cannot be a resident of two States at the same time.

Brent v. *Armfield*, 4 *Cranch C. C.* 579.

He may elect which shall be his domicile.

Burnham v. *Rangeley*, 1 *Wood* and *M.* 7 (*Me.*)

And the principle on which the citizenship of a corporation is founded as expressed in *Muller v. Dows supra*, viz., the conclusive presumption "that all the stockholders "are citizens of the State which by its laws created the "corporation," negatives the contention that such stockholders or the corporation can be "inhabitants" of any other State.

Indeed, it may be fairly contended that the term "inhabitant," as used in the Act of March 3, 1887, *supra*, is more restrictive than the term "citizen," as used in the sense of that statute. A State may contain several Federal districts (as in Arkansas), yet suit would not lie against an inhabitant of *one* district in an adjoining district in cases falling within the prohibition of the law. Diverse citizenship might exist, but the condition of actual inhabitancy would not. And that Congress herein used the word "inhabitant" as synonymous with the word "residence" is shown by the language of the succeeding proviso, which directs that where jurisdiction is founded on diverse citizenship *alone* suit shall be brought "in the district of the *residence*" of either plaintiff or defendant.

It follows that, the action being based upon a Federal statute, suit could not be brought in the Court below, the defendant not being an inhabitant of that district.

But it is contended, *contra*, that because the plaintiff in error, on overruling of its demurrer, answered and went to trial, it thereby waived the right to longer challenge the jurisdiction of the Court in this regard.

This contention is erroneous. Whilst objection to the jurisdiction is ordinarily raised by plea, the demurrer herein was proper and effectual to raise the question of jurisdiction over the person of the defendant and preserve the right of review upon that question in this Court.

The office of a plea to the jurisdiction is to advise the Court of the *facts* on which the jurisdictional objection is based. In ordinary pleading such facts must come from the defendant's side. But in present case the plaintiff's complaint gave *all* the facts of possible existence. Therefrom the nature of the action; the locus of injury and the citizenship of the respective parties was plainly stated. The Court took judicial notice of the public laws of Congress on which the action was predicated. Hence the proper mode in which to raise the question of jurisdiction was by demurrer, which, by admitting all the facts well pleaded, raised the question of law on the face of the record, viz: a civil cause of action arising solely under a law of the United States and suit brought in the Circuit Court of a district whereof the defendant was *not* an inhabitant.

In *Coal Company* v. *Blatchford* (11 *Wall*, 172, 178) this Court said:

"Here the citizenship of the parties is averred in the "bill of complaint, and consequent defect in the jurisdic- "tion of the Court is apparent, and a defect of this char- "acter thus disclosed may be reached on demurrer or "taken advantage of without demurrer, on motion at any "stage of the proceedings. A plea in abatement is re- "quired only where the citizenship averred is such as to "support the jurisdiction of the Court, *and the defend- "ant desires to controvert the averment.* The question of "citizenship constitutes no part of the issue upon the "merits."

In *Harkness* v. *Hyde* (98 *U. S.* 476, 479) it was held:

"Illegality in a proceeding by which jurisdiction is to "be obtained is in no case waived by the appearance of "the defendant for the purpose of calling the attention "of the Court to such irregularity; nor is the objection "waived when, being urged, it is overruled, and the de- "fendant is thereby compelled to answer. He is not con- "sidered as abandoning his objection because he does "not submit to further proceedings without contestation. "It is only where he pleads to the merits in the first in- "stance without insisting upon the illegality that the ob- "jection is deemed to be waived."

Moreover, the judgment of the Court below overruling the demurrer was not a *final* judgment.

In *Teal* v. *Walker* (111 *U. S.* 242, 246) this Court said:

"The writ of error is not taken to reverse the judgment "of the Court upon the demurrer to the complaint, for "that was not a final judgment, but to reverse the judg- "ment rendered upon the verdict of the jury. The error, "if it be an error, of overruling the demurrer could have "been reviewed on motion in arrest of judgment, and is "open to review upon this writ of error. When the "declaration fails to state a cause of action, and clearly "shows that upon the case as stated the plaintiff cannot "recover, and the demurrer of the defendant thereto is "overruled, he may answer upon leave and go to trial "without losing the right to have the judgment upon the "verdict reviewed for the error in overruling the demur- "rer. The error is not waived by answer, nor is it cured "by verdict."

In *Grace* v. *American Ins. Co.* (109 *U. S.* 278, 283) the Court said:

"As the jurisdiction of the Circuit Court is limited in "the sense that it has no other jurisdiction than that con- "ferred by the Constitution and laws of the United

" States, the presumption is that a cause is without its " jurisdiction unless the contrary affirmatively appears."

As the cause of action in the case at bar is one arising solely under the laws of the United States, and hence could not be brought except in the district whereof the defendant is an inhabitant, and as the complaint herein affirmatively declares that the defendant was *not* an inhabitant of the district wherein the suit was brought, this plain jurisdictional defect could be raised either on motion or by demurrer, and under the authorities, *supra*, the objection is plainly reviewable here.

In Courts of general superior jurisdiction, where all presumptions attend in favor of the jurisdiction, the contention *contra* may prevail. But where jurisdiction must affirmatively appear, demurrer thereto (all the facts being theretofore well pleaded) is not a waiver of the objection beyond the reach of review and correction in the appellate tribunal.

Furthermore, demurrer herein was in accordance with the Practice Act of Arkansas (*Mansfield's Digest*, Sec. 5028, *title Demurrer*), which provides :

" The defendant may demur to the complaint where it " appears on its face, either—

"*First.* That the Court has no jurisdiction of the person " of the defendant, or the subject of the action," etc.

II.

The Circuit Court had no Jurisdiction over the Subject-Matter of the Action.

A.

The injury alleged occurred on July 20, 1890. Prior to that date, by act approved March 1, 1889, entitled "An act

" to establish a United States Court in the Indian Terri-
" tory, and for other purposes " (25 Stats. 783), and by act approved May 2, 1890, to " Provide a temporary govern-
" ment for the Territory of Oklahoma, and to enlarge the
" jurisdiction of the United States Court in the Indian
" Territory, and for other purposes " (Session Laws, 51st Congress, 1st Session, p. 81), Section 29 (p. 93), Congress created a Federal Court with exclusive jurisdiction over causes of action in that Territory. The act of 1889, Section 6, provides " That the Court hereby established shall
" have jurisdiction in all civil cases between citizens of the
" United States who are residents of the Indian Territory,
" or between citizens of the United States or of any State
" or Territory therein, and any citizen of, or person or
" persons residing or found in, the Indian Territory," etc. And section 29 of the Act of May 2, 1890, *supra*, provides that the Court established by the foregoing act " shall, in
" addition to the jurisdiction conferred thereon by said
" Act, have and exercise within the limits of the Indian
" Territory jurisdiction *in all civil cases* in the Indian Ter-
" ritory except cases over which the tribal courts have ex-
" clusive jurisdiction," etc.

In view of the peculiar conditions existing in the Indian Territory, and in view of this legislation creating this Federal Court therein, and bearing in mind the sweeping provisions of the Act of May 2, 1890, last above quoted, it may be well contended that Congress thereby repealed all civil jurisdiction over causes of action arising in the Indian Territory conferred upon Federal Courts elsewhere. Certainly it may be well contended here that as a cause of action arising under Federal statute, the plaintiff in error was suable only in the district whereof it is an inhabitant, OR, if elsewhere, the United States Court, for the Indian Territory is the only other Federal Court having jurisdic-

tion thereover, the cause of action having arisen within the territorial limits of its jurisdiction.

B.

The Act approved August 2, 1882 (22 Stats., c. 371, p. 181), granting the plaintiff in error the right of way for construction of its railroad through the Choctaw Nation, gives, in Section 3, right of action in all cases of injury to persons or property occasioned by the construction or operation of said road therein, and affords judicial remedy for their enforcement by providing that—

"Consent is hereby given that the civil jurisdiction of "the District Court of the United States for the Western "District of Arkansas, and such other Courts as may be "established by authority of the United States, shall be "extended within the Territory and limits of the Choctaw "and Chickasaw Nations without distinction as to citizen- "ship of the parties, so far as may be necessary for the "enforcement of the provisions of this Act."

The jurisdiction thus conferred is plainly confined to those individual, occupants of the Choctaw Nation, who are there according to the laws, customs, and usages of said Nations. McBride was not such a party, and hence the jurisdiction of the District Court for the Western District of Arkansas would not bring him within this provision of the law. The express admission on the record is (p. 3) that McBride "was a white man, and not an Indian, neither by "birth, blood, marriage, or adoption; that at the time of "the injury complained of, and at the time he was in- "jured, as set forth and alleged in the complaint herein, "*that* the deceased was a citizen of the State of Arkansas, "and resided in the city of Fort Smith, Sebastian County, "Arkansas, in said Western District of Arkansas; that at

" the time he was injured he was not an inhabitant nor " resident of the Choctaw Nation, Indian Territory, but " was a brakeman on defendant's train, and was injured at " Cavanal, in said Choctaw Nation."

Hence the jurisdiction of the District Court for the Western District of Arkansas created under this right-of-way act did not embrace him. And whilst it is true that by the subsequent act of February 6, 1889 (25 Stats. p. 655), the Circuit Court powers theretofore vested in the District Court for the Western District of Arkansas were thereby taken away, and a Circuit Court for that district established, it is plain that the Circuit Court did not succeed to jurisdiction over this case by virtue of the provisions of the right-of-way act of August 2, 1882, *supra*, so far as relates to causes of action arising under that act, and certainly not as to McBride. When the alleged cause of action arose, the Federal Court for the Indian Territory had been established with full and exclusive jurisdiction " in all civil cases " as expressed *supra*.

C.

Congress, in extending chapter 119 of Mansfield's Digest relating to Pleadings and Practice over the Indian Territory by the act of May 2, 1890, *supra*, did not in purpose or intent create any new right or cause of action, but merely established the formula of pleading and practice alone for the guidance of the Federal Court in that Territory.

The act of March 1, 1889, creating a United States Court in the Indian Territory, *supra*, provides in Section 6 as follows:

" That the provisions of chapter eighteen, title thirteen, " of the Revised Statutes of the United States shall govern

" such Court so far as applicable: *Provided*, That the " practice, pleadings, and forms of proceeding in civil causes " shall conform as near as may be to the practice, plead- " ings, and forms of proceeding existing at the time in like " causes in the Courts of Record of the State of Arkansas, " any rule of Court to the contrary notwithstanding; and " the plaintiff shall be entitled to like remedies by attach- " ment or other process against the property of the de- " fendant, and for like causes, as now provided by the " laws of said State."

The " practice, pleadings, and forms of proceeding in " civil causes " in Arkansas are contained in the Code of Practice of that State, adopted in 1869. Nowhere therein is there found any provision giving a right of action for personal injury or right of survivor therein to the representative or heirs-at-law. When, therefore, Congress, by the subsequent Act of May 2, 1890, *supra*, enacted as Federal law, chapter 119, described by said Act, it simply supplemented Section 6 of the act creating the Federal Court in that Territory by making those sections of Mansfield's Digest which relate to practice and procedure solely a part of the laws of the United States, instead of mere rules of Court. Creation of statutory remedies beyond those existing at common law form too important subjects of legislation to be either assumed by construction or embraced within general provisions. The purpose and object of chapter 119 was to incorporate the Code of Practice of Arkansas, and to thereby provide modes of procedure. The right of action and the remedy here invoked have no proper place in this chapter. The paramount object thereof was entirely different, and hence it may be properly assumed that Congress alike had in mind this paramount object, especially when the effect of the act in adopting this chapter was to make part of the Federal law what before was directed to be taken as mere rules of Court.

As the sections of the Arkansas law on which this right of action is founded clearly did not relate to either practice or procedure, but provided statutory remedies beyond the common law, they should be excluded from Congressional adoption of this chapter, which has plain and paramount relation solely to judicial modes and form of practice and procedure, and not held as part of the Federal law, creating in this roundabout manner a cause of action which is in derogation of the common law.

The Act of May 2, 1890, *supra*, by Section 11, extends over Oklahoma Territory certain *chapters* of the compiled laws of Nebraska, whereas Section 31 thereof extends over the Indian Territory the laws of Arkansas as given in Mansfield's Digest thereof "relating to the *subjects spe-* "*cially mentioned* in this Section."

Hence, under Section 11, the very chapters of the Nebraska statutes are extended over Oklahoma Territory, while by Section 31 the laws of Arkansas are extended only as to the *subjects* specially mentioned therein, and the whole chapter is not adopted, as in Section 11. Adoption of the Arkansas laws relating "to pleadings and "practice, chapter 119," should be fairly construed as excluding any matter therein not germane to the subject thus "specially mentioned." Certainly the statutory right of action here maintained has no place under such title, and is not found in the Arkansas Practice Code of 1869, which this chapter of Mansfield's Digest is intended to reproduce.

Conclusion.

It is therefore respectfully submitted that the judgment below should be reversed.

First. Because the plaintiff in error is not an inhabitant

of the district wherein this suit was brought, and conceding the statutory remedy as part of the Federal law, the Court below had no jurisdiction of the defendant company; or,

Second. Exclusive jurisdiction in such civil cases is conferred upon the Federal Court, created in the Indian Territory, and no jurisdiction over the subject-matter of this action exists in the Court below.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Plaintiff in Error.

GEO. R. PECK,
E. D. KENNA,
Of Counsel.

IN THE

Supreme Court of the United States.

October Term, 1890. No. 1712.

THE SAINT LOUIS, ETC., RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

LUCY McBRIDE ET AL.

Come the defendants herein and move the court to dismiss this writ of error, as this court has no jurisdiction thereof; or to affirm the judgment, it being manifest that even if the court has jurisdiction, the question on which the jurisdiction depends is so frivolous as not to need further argument.

A. H. GARLAND,
H. J. MAY,
For Defendants.

To A. T. Britton, A. B. Browne, E. D. Kenna, and Geo. R. Peck, attorneys of record for plaintiffs in error in the above entitled cause.

You are hereby notified, that the defendants in error in the above named cause will, on Monday, the 11th day of May next (1891), on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the foregoing motion, and their brief thereon hereto attached.

Very respectfully,
A. H. GARLAND,
H. J. MAY,
Counsel for Defendants.

Office Supreme Court U. S.
FILED,
APR 18 1891
JAMES H. McKENNEY.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

No. 1712

THE SAINT LOUIS & SAN FRANCISCO RAILWAY COMPANY, *Plaintiff in Error.*

vs.

LUCY McBRIDE, ET AL., *Defendants in Error.*

Motion to dismiss or affirm with

STATEMENT AND BRIEF FOR DEFENDANTS IN ERROR, ON MOTIONS TO DISMISS ~~AND~~ OR AFFIRM.

STATEMENT.

J. H. MAYERS & CO., PRINTERS, STATIONERS, AND BINDERS, FORT SMITH, ARK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

THE SAINT LOUIS & SAN FRANCISCO RAILWAY COMPANY, ***Plaintiff in Error.***

vs.

LUCY McBRIDE, ET AL., ***Defendants in Error.***

STATEMENT AND BRIEF FOR DEFENDANTS IN ERROR, ON MOTIONS TO DISMISS AND AFFIRM.

STATEMENT.

On the 20th day of September, 1890, the plaintiffs below, Lucy McBride, and her three minor children, by their next friend, filed their complaint at law in the Circuit Court of the

United States for the western district of Arkansas, against the Saint Louis & San Francisco Railway Company, claiming damages from said defendant for negligently causing the death of James McBride, the husband of Lucy and the father of the other plaintiffs. It was alleged that the deceased was in the employ of said defendant as a brakeman on the cars of defendant, on that part of their railway extending from Fort Smith, Arkansas, through the Choctaw nation, in the Indian Territory, to Paris, Texas; and that on the 20th day of July, 1890, he was thrown from the car at Cavanal, in the Choctaw nation and in the western district of Arkansas, by the negligence of defendant, receiving injuries from which, two days later, he died.

As to citizenship, it was alleged in the complaint, that all of the plaintiffs " are citizens and residents of the state of Arkansas, and of the western district of Arkansas aforesaid" and that the defendant "is a corporation duly organized by and existing under the laws of the state of Missouri, and a citizen of said state of Missouri, but doing business in the said state of Arkansas, in the western district of Arkansas aforesaid, by permission of the laws of the said state of Arkansas, and in the Choctaw nation in the Indian Territory, in said western district of Arkansas aforesaid, by authority of an act of the Congress of the United States, approved August 2, 1882, in owning, maintaining and operating a line of railway" from St. Louis through said district and state and Choctaw nation, to Paris,

Texas; "and having duly authorized agents engaged in carrying on said business in said state and said western district of Arkansas, upon whom process may be served, in accordance with the laws of the state of Arkansas, and with an act of Congress extending said laws over the Indian Territory."

Service was had on the 22nd day of September, 1890, on the station agent of said defendant, at Fort Smith, Ark.

On the 4th day of November, 1890, the defendant filed a demurrer to the complaint, which, after stating the court and style of the case, proceeds:

"Comes the defendant herein and demurs to plaintiffs' complaint.

1st. Because the court has no jurisdiction of the person of the defendant.

2d. Because the court has no jurisdiction of the subject matter of the action.

3d. Because the complaint does not state facts sufficient to constitute a cause of action.

This was signed by defendant's counsel as its attorneys.

After argument, the court overruled the demurrer.

At the same time the demurrer was filed, defendant filed a motion for bond for costs, which after the caption is as follows:

Now comes the defendant herein and moves the court that the said Lucy McBride, who sues as the next friend of the minors in the complaint set forth and mentioned, be required to give bond for costs; because the said Lucy McBride, sueing

as next friend, is insolvent, and has nothing over and above the exemptions allowed under the laws of the state of Arkansas, which is liable to execution.

This was signed by defendant's counsel as its attorneys.

January 20, 1891, defendant answered, denying the allegations of negligence of defendant and setting up contributory negligence on the part of the deceased, but did not deny any of the allegations of the complaint in respect to the citizenship and residence of the parties.

On the trial the jury found in favor of the plaintiffs for $4000. A motion for new trial was overruled and judgment entered on the verdict, and defendant took the case on writ of error to the supreme court.

BRIEF.

The Act of Congress, approved February 25, 1889, (*Acts of 1888-9 p. 693*) provides that where a judgment does not exceed the sum of five thousand dollars the supreme court shall not review any question raised upon the record, except such question of jurisdiction.

The judiciary Act of 1887, approved March 3, 1887, (*Acts of 1886-7 p. 552,*) in the first sentence of section one expressly gives to the circuit courts of the United States jurisdiction in all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, in which there shall

be a controversy between citizens of different states. The only question, then, in the case, is, does the controversy in it arise between citizens of different states? It is alleged in the complaint, and not denied in the answer, that the plaintiffs are all citizens and residents of the state of Arkansas, and of the western district of Arkansas, and that the defendant is a citizen of the state of Missouri. The truthfulness of this allegation was not denied in the evidence at the trial, and is not now and cannot be denied. This gives the circuit court jurisdiction.

By the second clause of the first section of the Act of 1887, above cited, the district in which suits may be brought is designated, but only such suits can be brought in any district as the courts are authorized to take cognizance of by the first clause of the section. In other words, the first clause confers jurisdiction; the second clause only confers a personal privilege on the defendant, which he can waive or not at his pleasure. And this question of jurisdiction is entirely distinct from the question of service.

McCormick Harvesting Machine Co., vs. Walthers, 134 U. S. 41, 10 Sup. Court Rep. 485 and cases therein cited.

It is evident from the above principles and authorities, that the circuit court had jurisdiction of the subject matter, because it has jurisdiction concurrent with the

courts of the several states, *in all cases* of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars, and the parties are citizens of different states. There is no peculiarity required in the facts that may be litigated in the federal courts. If the citizenship of the parties is diverse as required by the statute, a controversy on any state of facts which by the general principles of law would constitute a good cause of action in a state court, can be heard and determined in the circuit court. In this case, the recovery was on a statute similar to Lord Campbell's Act, giving a right of action to the widow and next of kin of the deceased for negligently causing his death — a subject of litigation in every state — and jurisdiction of the parties of diverse citizenship, is expressly given, when they are before the court.

Defendant waived his right to object to the service, if there had been any defect in it, by not making the objection to it, instead of to the jurisdiction.

McCormick Harvesting Machine Co., vs. Walthers, 10 Sup. Court Rep. 485.

Fitzgerald & Mallory Const. Co, vs. Fitzgerald 11 Sup. Court Rep. No. 3, p. 36.

By filing a demurrer to the complaint without limiting his appearance to the special purpose of objecting to the service or

to the jurisdiction, and by filing the motion for bond for costs, the defendant waived all objections to the service and was in court for all purposes. The demurrer is not only to the jurisdiction of the person of defendant and to the subject matter of the action, but the third ground is "because the complaint does not state facts sufficient to constitute a cause of action." The idea of a special appearance being intended is thus excluded.

Jones vs. Andrews, 10 Wall. 327.
Robinson vs. National Stock Yard Co. 12 Federal Rep. 361.

But after the demurrer to the complaint was overruled, the defendant answered and went to trial, introduced witnesses, asked and obtained instructions to the jury and argued the case on its merits to the jury. This was a complete waiver of the grounds of demurrer:

Campbell vs. Wilcox, 10 Wall. 421.
Evans vs. Gee, 11 Pet. 80.
United States vs. Boyd, 5 How. 29.
Bell vs. Mobile & O. R. R. Co., 4 Wall. 598.
Aurora vs. West, 7 Wall. 82.
Young vs. Martin, 9 Wall. 354.
Watkins vs. United States, 9 Wall. 759.
Stanton vs. Embry, 93 U. S. 548.

The decisions of the Supreme Court of Arkansas on this point have always been the same, before and since the code, that by pleading over the grounds of demurrer are abandoned.

Tabor vs. Merchants Bank, 48 Ark. 454-7.
Chapline vs. Robinson, 44 Ark. 202.
Jones vs. Terry, 43 Ark. 230.
Jarrett vs. Wilson, 1 Ark. 137.

For many other Arkansas cases, *see Rose's Digest Ark. Rep. p. 270, 271.*

And this is the general doctrine.

Bliss Code Pl. 417.

The defendant by pleading over after his demurrer was overruled waived all objections to service and to the district in which he was sued, and to jurisdiction over the person of defendant, but could not waive the question of jurisdiction of the subject-matter, nor that the complaint did not state facts constituting a cause of action. But this last question is not reviewable here, the judgment being for less than $5000, and jurisdiction of the court below, the only question. The decision of the circuit court is final on that point, but if it were not final, the complaint states a cause of action, as given by the following statute of Arkansas in Mansfield's Digest:

"*Section 5225.* Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"*Section 5226.* Every such action shall be brought by and in the name of the personal representatives of such deceased person, and if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person Provided that every such action shall be commenced within two years after the death of such person."

This statute of Arkansas being *chapter 119, pleadings and practices, Mansfield Digest of the statutes of Arkansas,* was extended over the Indian country by section 31 of an Act of Congress, approved May 2, 1890. (*Acts of 1889-90 p. 94,*) as follows:

Section 31. That certain general laws of the state of Arkansas in force at the close of the session of the general assembly of that state, of 1883, as published in 1884 in a volume known as Manfield's Digest of the statutes of Arkansas *

* * * * * are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say provisions relating to * *

* * * *pleadings and practice, chapter 119.* *

* * * *

That the circuit courts have jurisdiction of this class of cases, though the right accrues in another state, was expressly decided in *Dennick vs. Railway Co., 103 U. S. 11,* on a statute precisely like this. See note in *14 American State Reports p. 353,* where the authorities are all collected.

The summons was duly served on the station agent of defendant at Fort Smith, Arkansas in the Western District of Arkansas.

The constitutional provisions and statutes of Arkansas as to service on a foreign corporation is as follows: Foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescribed by law.

Provided, that no such corporation shall do any business in this state, except while it maintains therein one or more known places of business and an authorized agent or agents in the same, upon whom process may be served: * * *

* * and be subject to the same regulations, limitations and liabilities as like corporations of this state. *

* * * *

Articles XII. Section 11, Constitution of Arkansas.

"*Section 4979.* Where the defendant is a corporation, created by the laws of this state, the service of summons may be upon the President, Mayor or Chairman of the Board of Trustees, and in case of the absence of the above officers, then it may be served upon the cashier, treasurer, secretary, clerk or agent of such corporation, and in case of railroad corporations upon any person who has control of any of the business of said corporation, either as clerk, agent or otherwise, who as such clerk or agent has to report to the corporation who employed them; and in cases of railroad corporations, a service of a copy of the summons upon the clerk or agent of any station in the county where the same shall be issued shall be deemed and considered as a good and valid service.

"*Section 4982.* Where the defendant is a foreign corporation having an agent in this state, the service may be upon such agent.

"*Section 5524.* Service of process on the officer or agent of such railroad corporation in the manner provided by law for

the service of process on railroad corporations organized under the laws of the state, shall be deemed to be a sufficient service on such corporation, its officers, agents and attorneys, as though personal service had been made on such corporation, its officers, agents and attorneys.

"*Section 5532.* In all other matters said foreign railroad company shall be subject to all the provisions of all acts in relation to railroads * * * * * and subject to the same service of process. * * * * * *"

It is submitted that under these provisions the service on an agent was good.

Railroad Co. vs. Harris, 12 Wall. 65.

Exparte Schollenberger, 96 U. S. 369.

St. Clair vs. Cox, 106 U. S. 350.

Insurance Co. vs. Woodworth, 111 U. S. 138.

Fitzgerald & Mallory Construction Co. vs. Fitzgerald, 11 Sup. Court, Rep. No. 3 p. 36. (decided at present term.)

St. Louis' I. M. & S. Ry. Exparte. 40 Ark. Rep. 141.

It is believed that all the principles involved in this case have been repeatedly decided by the Supreme Court and are especially emphasized in the cases of *McCormick Harvesting Machine Co. vs Walthers, 10 Sup. Court, Rep. 485. and Fitzgerald & Mallory Construction Co. vs. Fitzgerald,* decided at the present term, and that no further argument is needed.

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